87-954

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS
and
FRED E. CULVER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS - WESTERN DISTRICT

JAMES G. LINDQUIST
(*Counsel of Record*)
NORMAN O. SANDERS
1400 Merchants Trust Center
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 471-6444
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether a railroad right-of-way under the exclusive jurisdiction of the Interstate Commerce Commission can be lost to public use through abandonment before the effective date of an ICC Certificate permitting abandonment when the ICC has determined, pursuant to 49 U.S.C. §10906, that the right-of-way is suitable for mass transportation purposes and has ordered that the right-of-way be preserved for 180 days for sale for public purposes and when petitioner purchased the right-of-way, for use in a light rail mass transportation system, before the expiration of the 180 days and before the effective date of the ICC Certificate permitting abandonment.

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PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS - WESTERN DISTRICT

Petitioner, Kansas City Area Transportation Authority (KCATA) prays that a Writ of Certiorari issue to review the Judgment and Order of the Missouri Court of Appeals - Western District entered September 16, 1987.

OPINION BELOW

The opinion of the Missouri Court of Appeals - Western District (Appendix A) is not yet reported.

JURISDICTION

The opinion of the Missouri Court of Appeals - Western District (Appendix A), was filed on November 12, 1986. A timely Application to Transfer to the Supreme Court of Missouri was granted on March 17, 1987. On September 4, 1987 the Supreme Court of Missouri, after hearing oral argument, entered its Order, without opinion, retransferring the case to the Missouri Court of Appeals - Western District (Appendix C). By order dated September 16, 1987 (Appendix B), the Missouri Court of Appeals - Western District readopted its opinion filed November 12, 1986. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. §1257(3).

It is noted that the opinion below remands the case for trial on the issue of respondents' counterclaim damages for rents and profits derived by KCATA during its possession of the right-of-way. Clearly, the substantive federal question will survive the trial on this remaining issue and require the decision of this Court. The opinion of the state court with respect to the federal issue is, for all practical purposes, final. The application of pragmatic principles compels a finding that the judgment is "final" for jurisdictional purposes. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520.

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. §§10903 and 10906 set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, Kansas City Area Transportation Authority is a bi-state agency created by compact between the States of Missouri and Kansas and approved by Congress in 1966 (Public Law 89-599, 80 Stat. 826; R.S.Mo. §238.010; K.S.A. §12-2524). KCATA is charged with the responsibility of providing passenger transportation in the Kansas City metropolitan area.

The Country Club Right-of-Way is a railroad right-of-way approximately eight and one half miles long located in Kansas City, Jackson County, Missouri extending through heavily populated residential and commercial areas. KCATA began its efforts to acquire the Country Club Right-of-Way in 1970 after the right-of-way had been designated by planning agencies as holding an integral role in future passenger transportation development. The right-of-way was owned by a partnership consisting of the family of James G. Ashley and doing business as Kansas City Public Service Freight Operation (hereinafter "Freight Operation"). Freight Operation discontinued freight hauling in 1968 when the demand for freight service was eroded by an impending condemnation action of KCATA. Freight Operation, a carrier certified by the ICC, duly filed its notice of embargo in 1968.

KCATA commenced an action to condemn the Country Club Right-of-Way in 1970. In December, 1973,

KCATA took possession of the right-of-way pursuant to the condemnation award. Freight Operation appealed the case and, ultimately, the Supreme Court of Missouri en banc, issued its opinion and held:

> The effect of ATA's condemnation action, if successful, would be that it would take over the entire railroad right-of-way and bring about a permanent and total cessation of railroad service by appellant-railroad as well as any other railroad over this entire line of track. The appellant-railroad, however, remains under the jurisdiction of the ICC and the legal abandonment of its line of track or discontinuance of service can only be accomplished by order of the ICC. 49 U.S.C. sec. 1a(1); *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9, 10 (Mo. banc 1977).

As a result of this ruling, the Country Club Right-of-Way was returned to Freight Operation. This Court denied KCATA's Petition for Writ of Certiorari. 434 U.S. 1066, 55 L.Ed.2d 767, 98 S.Ct. 1243.

Since shortly after the embargo of its freight service in 1968, Freight Operation had consistently declared its intention to negotiate a sale of the right-of-way to KCATA for use in a light rail mass transportation system. Negotiations following the condemnation action, however, were unsuccessful and, in 1980, KCATA sought relief from the Interstate Commerce Commission (ICC Finance Docket Nos. 29330 and 29485); *Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 ICC 969 (1981)). The ICC exercised its jurisdiction over the railroad, and, in a series of rulings, issued its Certificate of Public Convenience and Necessity permitting Freight Operation

to abandon the right-of-way. The ICC, however, attached certain conditions to the exercise of the Certificate. In its decision dated August 19, 1981, the ICC ruled: "Freight Operation shall keep intact all of the right-of-way underlying the track, and all bridges and culverts on the line for a period of 180 days from the effective date of this decision to permit any State or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of this line."

The ICC ordered: "Subject to the conditions set forth above, an appropriate Certificate of Abandonment shall be issued. The railroad shall not effect abandonment prior to the effective date of the Certificate of Abandonment."

In its decision dated October 30, 1981, the ICC declared that the effective date of the certificate permitting abandonment was November 2, 1981. On October 27, 1981, KCATA and Freight Operation concluded the sale of the Country Club Right-of-Way to KCATA and the right-of-way was conveyed to KCATA on that date. Thus, KCATA acquired the right-of-way with the explicit purpose of using it for light rail mass transportation, as contemplated by 49 U.S.C. §10906, prior to the expiration of the 180 days and prior to the time when Freight Operation was permitted by the ICC to abandon the line. Freight Operation retained trackage rights over the Country Club Right-of-Way as a condition of the sale. Furthermore, Freight Operation did not and has not exercised the certificate permitting abandonment of the line.

This case ensued when respondents, owners of property abutting the right-of-way, built a structure which encroached on the right-of-way. Petitioner filed suit in

1983 seeking the removal of the encroachment and respondents filed their counterclaim alleging the abandonment of the right-of-way by Freight Operation and that KCATA had no legal interest in the right-of-way. Respondents also sought damages consequent to KCATA's possession of the right-of-way. The case was tried to a jury and a verdict returned in favor of KCATA. Judgment was entered on the verdict holding that there had been no abandonment of the right-of-way under Missouri abandonment law. Respondents appealed the judgment.

The Missouri Court of Appeals - Western District issued its Opinion on November 12, 1986 reversing the judgment in favor of KCATA (Appendix A). The Court did not consider, in its opinion, the principal contention of KCATA that an observance of federal ICC law required that the judgment be affirmed. Rather, the Missouri Court premised its ruling on the basis that KCATA was collaterally estopped on the issue of abandonment because the ICC had stated, in its August 19, 1981 decision that there had been a *de facto* abandonment of the Freight Operation line. Neither the Missouri Court of Appeals - Western District nor respondents have ever explained how the ICC could have found that the right-of-way had been abandoned and then proceeded to declare that it could not be abandoned, at least until November 2, 1981, and that it must be preserved for sale for public purposes for 180 days after that.

Nor can the decision below be upheld on the basis that there is an adequate state ground for the decision. The opinion of the Missouri Court of Appeals suggests that the Ashleys (Freight Operation) elected to abandon by concluding the sale of the railroad property to KCATA.

The Missouri Court draws the conclusion that the sale itself foreclosed any resumption of service over the line by Freight Operation. Such a conclusion ignores (1) the fact that the rail carrier reserved trackage rights on the right-of-way as an express condition of the sale and (2) that a sale of a right-of-way by one carrier (Freight Operation) to another (KCATA) does not accomplish an abandonment of the right-of-way.

The Missouri Court of Appeals further attempts to bootstrap its opinion by characterizing the facts relating to abandonment of the railroad easement under state law as "uncontested." To begin with, the jury that heard the evidence of Freight Operation's struggle to maintain and defend their ownership of the line decided that there had been no abandonment under state law. More importantly, the assertion that there was an abandonment under state law begs the question of whether there can be an abandonment absent an effective ICC certificate permitting it.

KCATA sought transfer from the Missouri Court of Appeals - Western District to the Missouri Supreme Court which transfer was granted. However, after oral argument, the Missouri Supreme Court entered its Order, without opinion, that the case be retransferred to the Missouri Court of Appeals - Western District (Appendix C). By its Order dated September 16, 1987, the Missouri Court of Appeals - Western District readopted its Opinion issued November 12, 1986 (Appendix B).

HOW THE FEDERAL QUESTION WAS PRESENTED

KCATA filed its Motion for Summary Judgment on Respondents' counterclaim with the trial court alleging:

> 1. That each of the several counts in Defendants' [Respondents'] counterclaim are premised on the claim that the property in question, which is part of the strip of land known as the Country Club Right-of-Way, has reverted to ownership of the defendants because the right-of-way has been abandoned. The statutes of the United States, 49 U.S.C. 10903 through 10907, establish the procedures which must be followed before a railroad right-of-way of this type (which is under the jurisdiction of the ICC) can be abandoned. In this instance, these conditions precedent to abandonment have not occurred and, therefore, there has been no abandonment of the Country Club Right-of-Way as a matter of law.

Petitioner's Motion was denied and the case proceeded to trial by jury. KCATA, submitted to the Court a proposed verdict directing instruction setting forth those elements which KCATA contended respondents should be required to prove to sustain a verdict. That instruction is as follows:

> Your verdict must be for defendant [respondents] if you believe: 1) A Certificate of Public Convenience and Necessity permitting the abandonment of the Country Club Right-of-Way was issued by the Interstate Commerce Commission and 2) the said Certificate of Public Convenience and Necessity became effective, and 3) all conditions of the said Certificate

of Public Convenience and Necessity had been met or had expired, and 4) thereafter, the Country Club Right-of-Way was abandoned.

The Court rejected this instruction and submitted the case to the jury on the factual issue of abandonment of the railroad easement by Freight Operation under Missouri law. The verdict returned by the jury was that there had been no abandonment by Freight Operation and judgment was entered in favor of KCATA.

Respondents appealed the judgment. KCATA filed its brief on appeal the principal point of which was the same contention it had raised in its Motion for Summary Judgment, to-wit: inasmuch as (1) the ICC was exercising its jurisdiction over the railroad line in November of 1981, and (2) had ordered that Freight Operation could not abandon the right-of-way before November 2, 1981 and had ordered the right-of-way preserved for 180 days and made available for sale for transportation purposes, and (3) since KCATA had purchased the right-of-way on October 27, 1981, there could have been no abandonment as a matter of law.

REASONS FOR GRANTING WRIT

I. The decision below conflicts, in principal, with the decision of this Court as to the pre-emption, by the Interstate Commerce Act, of a state court order which finds an abandonment of a railroad right-of-way before such abandonment is permitted by the ICC.

This Court, in *Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transportation Co.*, 467 U.S. 622, 81 L.E.2d 527, 104 S.Ct. 2610 (1984), decided that the

Staggers Rail Act Amendment to the Interstate Commerce Act, 49 U.S.C. §§10903-10906, did not pre-empt a state eminent domain statute used to condemn rail property *after* the property had been abandoned pursuant to the amendment. Special care was taken by this Court to distinguish the facts in that case, where the rail carrier had sought, received and exercised an ICC Certificate permitting abandonment, from a case where, as here, a state court presumes to find that an abandonment occurred *before* it had been permitted by the ICC.

Justice Marshall, delivering a unanimous opinion, stated in *Hayfield*:

> With exceptions irrelevant to this case[10] the provisions of the [Interstate Commerce] Act relate to requirements that must be met *before* the Commission will authorize an abandonment. Therefore, unless the Commission attaches postabandonment conditions to a Certificate of Abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end.[11] (Emphasis in original text) 81 L.Ed.2d at 537.

The footnotes referred to above are particularly instructive.

> [10]See e.g. 49 U.S.C. §10906: "If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable

terms, for sale for public purposes." 81 L.Ed.2d at 537.

[11]This does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment. For example, if the Commission authorized an abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate service elsewhere, pre-emption would almost certainly invalidate a subsequent order by a state court barring such a transfer. 81 L.Ed.2d at 537.

The opinion below by the Missouri Court of Appeals - Western District ignores the ICC's ruling, ignores the sale of the right-of-way to KCATA and allows the disintegration of the right-of-way by reversion to thousands of landowners whose properties abut the right-of-way. While this Court found in *Hayfield*, that the Interstate Commerce Act did not pre-empt state action with respect to railroad right-of-way property that had been abandoned pursuant to the Act, there can be no question but that the Act must pre-empt state action which requires abandonment of a railroad right-of-way prior to the time an abandonment is authorized by the ICC.

In cases where an abandonment of a railroad right-of-way has been sought pursuant to state law but prior to the issuance of an effective ICC Certificate permitting abandonment, it has been held that such efforts usurped the authority of the ICC and were, therefore, unconstitutional under the Supremacy Clause, Article VI, Constitution of the United States. *Louisiana & Arkansas Railway Co. v. Bickham*, 602 F. Supp. 383 (D. La. 1985); *Trustees of the Diocese of Vermont v. State of Vermont*, 496 A.2d 151 (Vt. 1985).

The Missouri Court's ruling that KCATA was estopped to deny the abandonment of the right-of-way was based solely upon one sentence in the ICC decision dated August 19, 1981 which said that "the record leaves no doubt that a de facto abandonment of the Freight Operation line has taken place." It is clear, though, that the ICC has no jurisdiction to determine if an abandonment has already occurred. The Interstate Commerce Act provides the ICC with jurisdiction in abandonment cases but such jurisdiction does not extend beyond a determination of whether "the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. §10903. A case dealing squarely with the extent of ICC jurisdiction under similar circumstances is *Powell v. United States*, 300 U.S. 275, 81 L.Ed. 643 (1937). There, the Court held that the ICC's role was confined to finding whether the present and future public convenience and necessity required or permitted the extension [or abandonment] of a line.

Plainly, the ICC could not have found that the railroad right-of-way was abandoned and then, in the same decision, order that there could be no abandonment of the line, at least until the effective date of a Certificate permitting abandonment. It is obvious that the "de facto abandonment" language of the ICC was mere dicta and beyond the scope of its jurisdiction. Therefore, it cannot serve as the basis for the opinion of the Court below.

II. The opinion below contravenes Congress' express intent that railroad property, no longer required for interstate commerce, be preserved where it is needed for other public purposes.

The consequence of the opinion of the Missouri Court of Appeals - Western District, if allowed to stand, is

that a railroad right-of-way strategically located in the heart of Kansas City's residential area will be lost to the agency which acquired it for use in a light rail mass transportation system. It is not hard to understand the Congressional purpose behind 49 U.S.C. §10906 (Appendix D). Railroad rights-of-way were formed, for the most part, for the shipping of freight. When that service is no longer needed the rights-of-way can be extremely valuable for passenger transportation systems particularly when extensive development has occurred around the right-of-way. Congress decided it unthinkable that a railroad right-of-way devoted to freight service should be lost to public use just because the need for freight service abated. Congress, through the Staggers Act, provided for the orderly transfer of such rights-of-way from one public use to another. 49 U.S.C. §10906.

The ICC, in fact, determined that the Country Club Right-of-Way was suitable for public purposes and, accordingly, attached to its Certificate permitting an abandonment a prohibition on the disposal of the rail properties unless they were first offered for sale for public purposes pursuant to 49 U.S.C. §10906. KCATA's purchase of the right-of-way from Freight Operation, before the effective date of the Certificate permitting abandonment, accomplished precisely the Congressional intent to preserve railroad rights-of-way for other transportation purposes.

In this case, KCATA sought to take advantage of §10906. The ruling below, however, ignoring as it does the requirements of the ICC orders, undoes the purchase and destroys the right-of-way.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Missouri Court of Appeals - Western District.

Respectfully submitted,

JAMES G. LINDQUIST
NORMAN O. SANDERS
1400 Merchants Trust Center
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 471-6444
Attorneys for Petitioner, Kansas City Area Transportation Authority

APPENDIX

APPENDIX A

NOTICE

THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE ISSUED AND RECEIVED.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KANSAS CITY AREA TRANSPORTATION AUTHORITY,	)	
Respondent,	)	No. WD 37398
-vs-	)	OPINION FILED:
4550 MAIN ASSOCIATES, INC. et al.,	)	NOVEMBER 12, 1986
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY
HONORABLE FOREST W. HANNA, JUDGE

Before Clark, Chief Judge Presiding, Nugent and Gaitan, JJ.

This appeal by 4550 Main Associates is from a judgment entered on a jury verdict finding the Kansas City Area Transportation Authority (ATA), to be the owner of a railroad right-of-way along an eight mile corridor, one segment of which crosses appellant's land. The judgment also operated to eject appellant from the property

and to enjoin future trespass. The disposition mooted appellant's counterclaims for rents and incidental relief. This appeal followed.

The right-of-way easement here in controversy has spawned extensive litigation and generated in this case 800 pages of trial transcript. Appellant presents fifteen points of error and the parties have filed 195 pages of briefs and argument. The pivotal issue, however, is readily identified as turning on the question of whether the claimed right-of-way has in fact been abandoned for railroad use and thus lost to those claiming the easement. Four of appellant's points deal with this question and urge that appellant was entitled to a directed verdict because abandonment in fact had been established and ATA was estopped to claim otherwise. The contention is dispositive of the case, but must be preceded by a recitation of some background detail.

HISTORY OF THE COUNTRY CLUB RIGHT-OF-WAY

Records of deeds and other documents introduced in evidence show the right-of-way in issue to have originated in 1873 by a conveyance to the Kansas City, Memphis and Mobile Railroad Company. The property was described as a strip of land fifty feet on each side of the center line of a railroad "as the same is or may be located." In 1926, the right-of-way was acquired by the Kansas City Public Service Company and later by Kansas City Transit, both being municipally franchised street car and bus companies providing local passenger service.

In 1962, when use of street cars had ended in Kansas City, thereby making a rail line surplus to the municipal

transit company, the right-of-way was sold and assigned to parties named Ashley. During the six years which followed, the Ashleys continued a rail freight operation, previously offered by the municipal transit company as an adjunct to its passenger service. The freight service moved rail cars to and from mercantile businesses along the route providing connections to other carriers at either end of the route. The freight service provided by the Ashleys ended in 1968 and was never resumed. No rail traffic along the route has moved since that date and no customer demand for the service has existed.

The subject right-of-way is frequently referred to as the Country Club line. This name stems from the route designation of the street car service which formerly used the track in municipal transit service. Under Ashley ownership of the right-of-way, the freight transport business was referred to as the Kansas City Public Service Freight Operation, apparently a partnership. That entity held a certificate from the Interstate Commerce Commission as an interstate common carrier and served customers along the right-of-way by delivering and picking up freight which was interchanged with other rail carriers coming from or destined to shippers throughout the country. When the Ashleys ended rail service in 1968, they gave notice to the Interstate Commerce Commission that service on the line was "embargoed." Such notice indicates that the certificated carrier will no longer accept freight for delivery along the embargoed route. Customarily, an embargo indicates a temporary suspension of service attributable to conditions beyond the carrier's control.

The Country Club railroad line continued under embargo status from 1968 until 1981 when the ICC issued

its certificate of abandonment. During the period of embargo, the Ashleys removed sections of the track, paved over areas of the right-of-way for use as automobile parking lots and leased locations where advertising billboards were erected.

The ATA is a bistate transit authority which operates buses in the greater Kansas City vicinity. It has long had the objective of acquiring the Country Club line for future development of mass transit. In 1970, after attempts to negotiate a purchase of the right-of-way from the Ashleys had failed, the ATA brought proceedings to take the property by condemnation. A jury awarded compensation to the Ashleys, the money was paid and the ATA took possession, but on appeal, the Missouri Supreme Court ruled that a right-of-way held under certification of an interstate common carrier by the Interstate Commerce Commission was under the exclusive jurisdiction of the Commission and could not be condemned under state law. *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9, 10 (Mo. banc 1977). The property was thereby restored to the Ashleys under their claim to ownership of the easement.

Despite the absence of any use of the right-of-way for railroad purposes since 1968, the certificate of public convenience and necessity issued to the Ashleys by the ICC remained in effect after 1968 continuing jurisdiction over the route in the Commission, as the Supreme Court opinion cited above recognized. To remove this impediment to condemnation, the ATA instituted proceedings before the Commission in 1980 to decertify the route. These proceedings before the Interstate Commerce Commission will be described below in detail. It suffices for this summary to say that a finding

of abandonment in fact was made by the Commission sustaining the ATA contention that the Ashleys had neither the capability nor intent to resume rail service along the route of the right-of-way easement.

As a final development in history of the Country Club right-of-way, on October 27, 1981, the Ashleys agreed with the ATA upon terms of sale and sold to the ATA their interest in the right-of-way. The claim which the ATA asserts in this suit is based on that transaction.

NATURE OF PROPERTY RIGHT AT ISSUE

Before proceeding to a discussion of the issues presented to the trial court, it is necessary to define the interest in real estate represented by the Country Club right-of-way.

As was noted in the previous section of this opinion, the first record of ownership in the right-of-way appears in a deed from Wyatt and Mary Webb to the Kansas City, Memphis and Mobile Railroad Company. The deed recited a valuable consideration and contained no restrictions on the use of the property or limitation on the quantum of title transferred. It may therefore be assumed that the grantee acquired a fee simple estate, *Nigro v. Ashley*, 690 S.W.2d 410, 417 (Mo. App. 1984), if the description of where the railroad was situated could be supplied. The Kansas City, Memphis and Mobile Railroad did not, however, survive. It entered bankruptcy and on a sale of the assets by the bankruptcy trustee, the interest in the right-of-way was conveyed to James I. Brooks on December 15, 1879.

It is not shown in this record whether the Kansas City, Memphis and Mobile Railroad was ever built or

what use, if any, was made of the right-of-way by the grantee, Brooks. Moreover, the chain of title ends with the conveyance to Brooks. No deed from Brooks appears and there is no record in Jackson County of any administration on his estate. There is no title record on the property for the next twenty-two years.

On October 4, 1901, parties named William and Alice Reid, who were then strangers to the record title, executed a quit-claim deed to the right-of-way in favor of E.E. Rankin who then conveyed on the following day to Winner Real Estate Company, that by warranty deed. In 1907, Winner Real Estate conveyed to the Kansas City and Westport Belt Railway Company but, as evidenced by the record of proceedings in the United States District Court, that railroad suffered judicial foreclosure and the right-of-way was sold by a trustee to the Kansas City Railways Company, a predecessor to the Kansas City Public Service Co.

Although the ATA and their grantors, the Ashleys, trace an unbroken chain of title to William and Alice Reid, grantors in the earliest recorded deed subsequent to the conveyance to James I. Brooks in 1879, there has been no showing of any title in the Reids and therefore the conveyances which depended on the Reids' ownership could not have transferred title. No valid alternate basis has been proposed to support a claim that the Reids owned any estate in the right-of-way[1] and no evidence was pre-

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1. The ATA does argue that because the deed from Winner Real Estate announced Winner to be the owner of an estate in fee, title was thereby shown under the "ancient documents" rule. That rule is one of evidence which sanctions the proof of facts by documents otherwise not admissible to prove the statements because amounting to hearsay. The estate in real estate is not a fact to be proved by a deed recitation. Moreover, the issue here is not the title held by Winner, but that owned by the Reids.

sented to support any contention that the Reids had acquired title under any hypothesis.

Throughout the period commencing with acquisition of the right-of-way by the Kansas City Railways Company in 1916, it appears that the right-of-way was continuously used for transport of passengers or freight or both by rail until the Ashley embargo in 1968. That usage was obviously sufficient to create an easement by prescription, but by the very nature of the use for railroad purposes, the parties in interest are precluded from claiming acquisition of fee title by adverse possession. Indeed, no such claim is or has been made here by the ATA.

In light of the foregoing, the subsequent discussion in this opinion will proceed on the premise that the property interest owned by the Ashleys was an easement for a railroad right-of-way acquired by prescription and not a fee estate in the land.

ISSUES PRESENTED BY THE PLEADINGS, SUBMISSION AND JUDGMENT

Appellant is the owner of certain real estate improved with commercial structures located on the west side of Main Street in Kansas City. The Country Club right-of-way runs in a diagonal direction along the west or rear of appellant's land. According to the ATA petition filed in this case, appellant has been occupying that portion of the claimed right-of-way bounded by a projection of appellant's side property lines in a westerly direction and has built structures on the right-of-way and has used the ground for automobile parking and ingress to and egress from the rear of appellant's building. The petition sought

a judgment that appellant be ejected from the right-of-way and that ATA be declared the owner.

By its anwers, appellant generally denied ATA's claims of ownership and affirmatively alleged that the easement formerly burdening its fee interest had terminated by abandonment. Appellant also asserted counterclaims which asked for an accounting for rents and profits derived by ATA and for damages.

The submission to the jury was upon instructions which required a finding in favor of ATA unless the jury believed appellant had proved its claim of abandonment. Consideration of appellant's claim for damages was, of course, conditioned on proof of abandonment. The jury found in favor of ATA and the court entered judgment which also described the railroad right-of-way and ATA's ownership of the easement.

THE ICC PROCEEDINGS

ATA compiled for purposes of this suit a record of the ICC proceedings designated plaintiff's exhibits 17 and 18. The parties stipulated at trial to the authenticity of the exhibits. One of the issues on this appeal is the ruling of the trial court which precluded appellant from reading portions of this record to the jury. Admission of exhibits 17 and 18 into evidence in their entirety is not an issue on this appeal because we judicially notice this stipulated record. This we do because, unlike decisions of state administrative agencies, the orders, regulations and decisions of the Interstate Commerce Commission, and other federal regulatory agencies, are made pursuant to federal statutes and have the force of law. *Hiatt v. Wabash Ry.*, 69 S.W.2d 627, 630 (Mo. 1933);

Insurance Co. of the State of Pennsylvania v. West Plains Air, Inc., 637 S.W.2d 444, 446 (Mo. App. 1982).

The Interstate Commerce Commission records contained in plaintiff's exhibits 17 and 18 reveal the following: Proceedings applicable to the entire Country Club certificated route and the abandonment of service were initiated by an application filed by ATA on October 13, 1980. The filing was entitled "Application For Certificate Of Public Convenience And Necessity Permitting Abandonment Of Railroad." Among the allegations in the application, verified on oath of the ATA's agent, the application set out:

> "(1) The present physical condition of the Country Club Right-of-way is such that it is totally unusuable for railroad operations. It has been fenced off, leased out for parking purposes, paved over and generally allowed to fall into a state of disrepair that would not permit railroad traffic.
>
> (2) Applicant states that even if the necessary rehabilitation is performed, the line could not be operated properly since there are no longer any customers for rail service on this line."

The application sought approval by the ICC of the abandonment of the trackage and right-of-way as a certificated common carrier route, thereby removing that obstacle to condemnation of the Ashleys' interest. The Ashleys opposed the application thus framing an adversarial contest over the issue of whether past non-use of the right-of-way and the absence of any prospect for reinstitution of service warranted a declaration of abandonment.

The decision on the application by ATA for abandonment of the Country Club right-of-way was rendered by

the ICC on August 19, 1981 and a certificate and decision in amended form were issued September 11, 1981 and served September 28, 1981. The decision sustained the applications for abandonment and recited the following findings of fact material to this case:

> "The record leaves no doubt that a *de facto* abandonment of the Freight Operation line has taken place. No rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of Freight Operation to solicit traffic or reinstate rail service. Indeed, the current use of the rail line for parking lot and billboard purposes is totally unrelated to the carrier's obligation to perform rail service." (Emphasis in original).

The decision also stated:

> "Although it is true that the grant of an abandonment application is permissive and the railroad can choose not to surrender its common carrier status and obligations, a certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations. AB-71 (sub-No. 1), *Anne Arundel County and the City of Annapolis - Abandonment over the Baltimore and Annapolis Railroad Company from Glen Burnie to the City of Annapolis* (not printed), decided February 27, 1980."

The Ashleys filed a petition for administrative review of the August 19, 1981 decision pursuant to 49 C.F.R. § 1100.98(c)(1) contending, among other points, that the Commission had erred in its finding of de facto abandonment. The Ashleys argued that they had no intent to abandon but had always evidenced the purpose of pre-

serving the line for future use. The ATA presented suggestions opposing the petition for review and argued the Ashleys' contention that they had no intention to abandon was "whimsical." The Commission denied the application for administrative review.

The next event occurred, as noted above, when ATA and the Ashleys agreed October 27, 1981 on a sale of the right-of-way. ATA sought at the same time to withdraw its previous application for abandonment filed with the ICC and to strike the August 19 and September 28 decisions. As the ATA motions announced, the ATA was concerned that the abandonment certificate issued by the ICC could be used by private parties as a basis for arguing that cessation of rail operations by the carrier, the Ashleys, after abandonment had been declared would terminate the right-of-way easement. The ATA request to withdraw the abandonment application and motion to strike were summarily denied by the Commission October 30, 1981.

At the final proceedings before the ICC recorded in the exhibits, the ATA and the Ashleys filed a joint petition December 22, 1981 requesting that the case be reopened for the purpose of imposing a 90 day expiration date on the certificate of abandonment. The effect of such a modification in the decision would be to expunge the certificate if the carrier did not exercise the option to abandon within the stated period. Among the reasons offered by ATA and the Ashleys for an amended decision which would cause the certificate of abandonment to expire was the concern that the ICC decision could be used by abutting property owners to contend that under state law, the right-of-way easement had terminated by abandonment. The ICC entered its decision on March 18, 1982 denying the joint petition and stated in part:

"In the face of no rail operations over the subject line in the past twelve years nor any reasonable attempt to provide rail service, it was apparent that a continuation of our (ICC) jurisdiction over the line was neither necessary nor desirable. For this reason, the abandonment authorization issued in our decision served August 21, 1981, imposed no time limitation upon the authority granted. The intent of the August 21, 1981 decision to impose no time limitation upon the abandonment authorization was properly reflected in the certificate of abandonment issued November 2, 1981.

Petitioners' concern over the potential for litigation arising out of conflicting claims to the subject right-of-way are directed at issues relating to real property rights. Such matters are not properly within the purview of this Commission but fall with the exclusive jurisdiction of the State in which the property is located."

COLLATERAL ESTOPPEL AND THE ISSUE OF ABANDONMENT

The primary, if not exclusive, defense to the ATA petition in ejectment was appellant's claim that ATA acquired no property interest in the right-of-way because the Ashleys had abandoned the operation of a railroad prior to any assignment or attempted assignment of the easement to the ATA and that there were no easement rights to transfer. Apart from the facts evidencing abandonment, the cessation of all rail service, removal of tracks and use of the property for parking lots and billboards, appellant moved for judgment in its favor based on the

doctrine of collateral estoppel resulting from the ICC proceedings. This contention was rejected by the trial court and in points presented on this appeal, appellant argues that a failure to render judgment in its favor based on estoppel was error.

Beyond question, a critical issue in the case was whether the Ashleys had abandoned the use of the Country Club right-of-way for the purposes it was established and, in consequence, whether any property rights remained which could be sold and conveyed to ATA. Appellant argued at trial and reasserts here that ATA was collaterally estopped from asserting there had not been an abandonment because ATA sought and received from the Interstate Commerce Commission a decision that abandonment had occurred.

Collateral estoppel, also described as issue preclusion, prevents the same party from relitigating issues which have been previously adjudicated. There is no requirement of mutuality of estoppel and a stranger to the prior suit may assert collateral estoppel against a party to a prior suit to bar relitigation of issues already decided. *Oates v. Safeco Insurance Co. of America,* 583 S.W.2d 713, 719 (Mo. banc 1979). The nature of collateral estoppel is such that a fact appropriately determined in one lawsuit is given effect in another case involving different issues. *Hudson v. Carr,* 668 S.W.2d 68, 70 (Mo. banc 1984). To invoke the doctrine of collateral estoppel, four elements must be present: (1) the issue decided in the prior litigation is identical with the issue in the present action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with the party to the prior adjudication, and; (4) the party against

whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Lewis v. Barnes Hospital,* 685 S.W.2d 591, 594 (Mo. App. 1985).

In this case and in the case before the ICC, it is apparent that elements (3) and (4) above are satisfied. ATA was the moving party before the ICC and is the party against whom the estoppel is asserted. There was a full and fair opportunity for ATA to assert its position as evidenced by the ICC decision in favor of the result ATA sought. As to element (2), an adjudication on the merits, ATA does not make any contention here that the ICC decision was not equivalent to a judgment. The proceeding was adversary in character and matured after post-decision motions to a non-appealable result. The authorities previously cited indicate that the ICC decision has the force and effect of federal law. No reason appears why, for purposes of estoppel, the decision should not be equated with a judgment on the merits. This leaves element (1), the identity of issues, which requires further discussion.

The ICC decision may be invoked for estoppel purposes only if abandonment for ICC decertification of common carriers rests on the same factual grounds and upon the same principles of law as does abandonment of a railroad right-of-way easement under Missouri property law. We look first to Missouri property law.

Abandonment is one of the recognized methods of terminating or extinguishing an easement and is complete when the privilege of use authorized by the easement wholly and permanently ceases. *Eureka Real Estate & Investment Co. v. Southern Real Estate & Financial Co.,* 200 S.W.2d 328, 331 (Mo. 1947).

Mere non-user of an easement will not extinguish the easement unless accompanied by an intention on the part of the owner of the dominant estate to abandon it. There must be an intention to abandon without an intention to again repossess it. *Hatton v. Kansas City, C & S Ry.*, 162 S.W. 227, 232 (Mo. 1913). The doctrine of abandonment will in some cases operate against railroads. *St. Louis-San Francisco Ry. v. Dillard*, 43 S.W.2d 1034, 1038 (Mo. 1931). When a railroad ceases to use for railroad purposes property over which it has an easement, the original owners or their grantees thereafter hold the property free from the burden of the easement. *G.M. Morris Boat Co. v. Bishop*, 631 S.W.2d 84, 88 (Mo. App. 1982). Some Missouri cases dealing generally with abandonment of easements refer to relinquishment of possession as a necessary element of abandonment. In the case of railroads, however, an easement for a railroad right-of-way is extinguished when the railroad ceases to run trains over the land. *Schuermann Enterprises, Inc. v. St. Louis County*, 436 S.W.2d 666, 668 (Mo. 1969). The test for abandonment of an easement under Missouri law is, therefore, non-user of the easement accompanied by conduct indicating an intention to abandon.

Federal case law announced in decisions considering abandonment in the setting of Interstate Commerce Commission certification of rail service applies a standard identical to Missouri law. In *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313 (1981), the court observes in a footnote: "An abandonment is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line," citing *ICC v. Chicago & North Western Transportation Co.*, 533 F.2d 1025, 1028

(8th Cir. 1976). Also cited is *ICC v. Chicago, Rock Island & Pacific R.R.*, 501 F.2d 908, 911 (8th Cir. 1974) where it is said that abandonment implies an intention to indefinitely or permanently cease all service and factually, determination of the question revolves around the intent of the railroad.

It follows from a comparison of federal and Missouri law applicable to abandonment of a right-of-way by a railroad that the Interstate Commerce Commission, in reaching its decision that the Ashleys had abandoned the Country Club line, applied the same law as is controlling in the present case. Despite the protestations by the Ashleys that they were holding possession of the right-of-way for some future railroad use, the undisputed evidence was that no such use was realistically in prospect and the property was in fact being used for purposes totally unrelated to a railway operation. The actual conduct by the Ashleys was, and for some years had been, consistent only with an intent to cease indefinitely all use of the easement for a railroad.

The result reached by the Interstate Commerce Commission and advocated by the ATA is binding on the ATA under the doctrine of collateral estoppel. All of the elements of collateral estoppel are present. The ATA is not to be heard in this case to assert a claim diametrically opposed to that which it presented to the Interstate Commerce Commission merely because in the setting of this proceeding, its interests have changed. The record was sufficient to support a finding of abandonment in fact and the trial court was in error in failing to sustain appellant's motion for judgment on grounds of estoppel.

The ATA argues that appellant was properly denied the benefit of collateral estoppel associated with the ICC

decision first, because abandonment could only mature under ICC procedure at the election of the Ashleys and not by the decision itself, and second, because on the effective date of the decision, November 2, 1981, the Ashleys could not make the election, having sold the right-of-way to the ATA six days earlier. This argument fails to recognize the distinction between abandonment of the right-of-way in fact for purposes of the property easement and abandonment of status as an ICC certificated carrier.

It is correct that an ICC certificate of abandonment is permissive in that the carrier may elect to resume service and retain certificated status or may accept the option of abandonment.[2] In this case, the Ashleys did elect to abandon by concluding the sale of all the railroad property to the ATA. Quite obviously, the Ashleys foreclosed any possibility of electing to resume service over the line as a certificated common carrier when they divested themselves of the physical properties. The sale itself was a conclusive indicia of abandonment on the part of the Ashleys. *Seventy-Ninth Street Improvement Corp. v. Ashley*, 509 S.W.2d 121, 123 (Mo. 1974); *Concord Township v. United States*, 625 F.2d 1068, 1072 (3rd Cir. 1980).

The associated contention that abandonment could not have occurred until November 2, 1981, the effective date of the ICC decision, would be relevant only if this

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2. The carrier is effectively put to the choice by issuance of the certificate of abandonment. In the event the carrier does not abandon certification but also does not resume service, the ICC may, for the benefit of shippers, obtain injunctive relief compelling the carrier to provide service. *ICC v. Chicago & N.W. Transp. Co., supra.*

case presented a question of jurisdiction as did the previous case of *Kansas City Area Transportation Authority v. Ashley, supra.* Had the ATA again undertaken to condemn the Ashleys' interest, it could well have been argued that ICC jurisdiction continued to prevent intrusion of state authority to condemn until ICC jurisdiction was finally surrendered. Here, however, the very transaction upon which the ATA relies for its claim to the easement, the sale by the Ashleys, has validity only if the Ashleys were free to dispose of the route without hindrance by the ICC.

It is significant in evaluating the ATA contention to note that the sale to the ATA made no pretense or attempt to assign the ICC route certification and ATA advances no claim to standing in its action here as an interstate carrier, nor could it. Certification of any carrier by the ICC over the Country Club route was precluded once the Commission found there was no public need for service. Moreover, the ATA's professed intention to use the route at some future date for light rail transit involves an activity not subject to ICC regulation and therefore a certificate of public convenience and necessity is not a subject in which the ATA has any legitimate interest. In sum, the only significance of the six day period between October 27, 1981 and November 2, 1981 was the theoretical obligation of the Ashleys as certificate holders to provide freight service and a corresponding restriction on their entitlement to dispose of the route. Only the ICC or freight customers would have any standing to complain that the Ashleys had transferred their interests to ATA before the certification of abandonment was final. No such claims have been made and the ATA is in no position to do so.

ABANDONMENT OF THE EASEMENT AS AN UNCONTESTED FACT

Apart from the bar of collateral estoppel, it also appears the evidence in the case established conclusively that the Ashleys had in fact abandoned the easement for railroad use long prior to the sale to the ATA and the issue was therefore not for decision by the jury. This contention is presented by appellant in Point V of its brief.

The facts on this subject, discussed earlier in this opinion, were not the subject of any dispute. No railroad cars or locomotives had been operated on the Country Club line for more than twelve years before the purported sale of the right-of-way to the ATA. There were no customers for rail freight service, the prior service had been discontinued indefinitely and the Ashleys had no plans to resume service. Some sections of the trackage had been removed, parking lots and billboards had been installed on the right-of-way and in consequence, the continuity of the route had been interrupted so that trains could not be run. The sole sources of income from the right-of-way to the Ashleys between 1968 and 1981 were from non-railroad uses including automobile parking lot fees and billboard rentals.

The authorities previously cited, *St. Louis-San Francisco Ry. v. Dillard, supra;* and *Schuermann Enterprises, Inc. v. St. Louis County, supra,* establish that when an easement is created for a rail line, that easement terminates and the abutting property owners are freed from the burden of the easement once the holder of the easement ceases using the property for railroad purposes. Abandonment of the easement is a necessary consequence

when trains no longer are operated over the land on which the easement is claimed. An intention to abandon is inferred by the discontinuance of rail service with no prospect for resumption of service.

The basis on which the Ashleys claimed to have retained the right-of-way easement, despite twelve years during which no rail operations were conducted, was an indefinite prospect that the right-of-way could be used at some uncertain future date for mass rail transit. James G. Ashley, Jr. in his own testimony acknowledged he had no capability to establish such a service, that mass rail transit had not been a feasible use of the property between 1968 and 1981, that it was not a practical project as of the date of trial and might never be.

The evidence in this case, summarized above, established conclusively that the Ashleys had abandoned the right-of-way for railroad uses, despite their continued possession and use of the property for rental income, and the trial court therefore erred in submitting the issue of abandonment to the jury.

UNRESOLVED ISSUES

The conclusion that the right-of-way easement had been lost by abandonment and did not constitute a property interest in real estate which could be transferred to the ATA by the Ashleys necessitates reversal of the trial court judgment, but does not conclude the case. As was noted earlier, appellant asserted counterclaims against the ATA based on the contention that use of the segment of the purported easement abutting appellant's unburdened fee was wrongful and ATA should account for any rents and profits derived therefrom. Reversal of the judgment

in favor of the ATA on its claim to the easement necessarily revives the counterclaims.

Appellant's counterclaims were pleaded in four counts, accounting, conversion, conspiracy and constructive trust, the conversion count being based on an allegation of a confederation between ATA and the Ashleys in designing the sale contract of October 27, 1981. The conversion count was distinguishable only in its prayer for punitive damages. At the close of appellant's evidence, the court sustained a motion to dismiss the conspiracy count and also sustained a motion for judgment in favor of ATA on appellant's claim for punitive damages. The submission, as best the trial record can be construed without a formal judgment entry on the counterclaims, was for a recovery of appellant's actual damages based either on an accounting or on conversion.

Appellant is entitled to an assessment of damages by a jury on one or more of the theories pleaded, although the counterclaim also presents some claims of an equitable nature tryable to the court. The case must therefore be remanded for disposition of the counterclaims in present or amended form consistent with the relief appellant may ultimately choose.

The judgment in favor of Kansas City Area Transportation Authority on its petition for ejectment and declaration of ownership in the right-of-way is reversed and the case is remanded for trial of the counterclaims by 4550 Main Associates, Inc.

All concur.

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Donald B. Clark,
Chief Judge Presiding

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Respondent,	)	No. WD 37,398
VS. (JACKSON) 4550 MAIN ASSOCIATES, INC., et al., Appellants.	)	Circuit Court 83-14703

ORDER

NOW it appearing to this Court that on September 4, 1987, the Missouri Supreme Court issued an order re-transferring the above-styled cause to this Court, and being fully advised in the premises,

IT IS ORDERED that the opinion written by Judge Donald B. Clark and adopted and filed by this Court on November 12, 1986 and modified on February 3, 1987, be and it is hereby readopted as the opinion of this Court and that the mandate of this Court be issued forthwith accordingly.

Dated this 16 day of September, 1987.

/s/ Don W. Kennedy
Don W. Kennedy,
Chief Judge

cc: Mr. William S. Nixon
Mr. James G. Lindquist

APPENDIX C

SUPREME COURT OF MISSOURI
EN BANC

September 4, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Respondent,	)	
vs.	)	No. 69136
4550 MAIN ASSOCIATES, INC., et al., Appellants.	)	WD #37398

ORDER

Retransferred to the Missouri Court of Appeals - Western District.

Day - to - Day

/s/ William H. Billings
William H. Billings,
Chief Justice

STATE OF MISSOURI—SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 4th day of September 1987 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said

Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 4th day of September, 1987.

/s/ Thomas F. Simon
Clerk.

/s/ Mary Elizabeth McHaney,
D. C.

APPENDIX D

49 U.S.C. §§ 10903, 10906

§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 405(b) of the Rail Passenger Service Act (45 U.S.C. 565(b)).

(c) Repealed. Pub.L. 96-448, Title IV, § 402(a)(2), Oct. 14, 1980, 94 Stat. 1941.

§ 10906. Offering abandoned rail properties for sale for public purposes

When the Interstate Commerce Commission finds under section 10903 of this title that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.